Supreme Court of the United States

(October Term, 1945)

No.....

Ward Morrison, Jr., Austin Hudson and Orie A. Jones, et al.,
Petitioners,
VERSUS
Maryland Casualty Company,
a corporation,
Respondent.

BRIEF IN SUPPORT OF PETITION

STATEMENT OF THE CASE

This has already been sufficiently stated in the preceding Petition under the heading "Summary Statement," which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

(1) The Circuit Court of Appeals erred in holding that the doctrine of proximate cause was not applicable in determining liability and coverage under respondent's insurance policy.

(2) The Circuit Court of Appeals erred in holding that Endorsement No. 1 exempted respondent from liability and coverage for loss and damage sustained by some of petitioners following the explosion, where said explosion

was merely incidental to, occurred during the course of, and was directly and proximately caused by a precedent negligent and hostile fire, for which liability and coverage were admittedly furnished under respondent's insurance policy.

(3) The Circuit Court of Appeals erred in holding that "loss and damage" sustained by some of petitioners following the explosion were synonymous with "*accidents* arising out of explosion" within the meaning and import of Endorsement No. 1.

(4) The Circuit Court of Appeals erred in holding that Endorsement No. 1 was unambiguous.

(5) The Circuit Court of Appeals erred in giving said exclusion clause, Endorsement No. 1, a liberal construction in favor of respondent instead of a strict construction against respondent, as required by applicable State and Federal decisions.

(6) The Circuit Court of Appeals erred in *reversing* outright the declaratory judgment of the district court in favor of petitioners, when under the admissions of respondent made in both lower courts, said judgment was in part correct and should have been *affirmed*.

ARGUMENT

First Point

The Circuit Court of Appeals erred in holding (contrary to local law and decisions of this Court, other Circuit Courts and other State Courts) that the doctrine of proximate cause was not applicable in determining liability and coverage under respondent's policy, and that Endorsement No. 1 exempted respondent from liability and coverage for loss and damage following the explosion, where said explosion was merely incidental to, a part of, and was directly and proximately caused by a precedent negligent and hostile fire, for which liability and coverage were furnished under respondent's policy.

(1) Oklahoma is committed to the rule that clauses in insurance policies purporting to exempt the insurer from liability under certain conditions will be construed strictly against the insurer and liberally in favor of the insured. *National Life & Accident Ins. Co.* v. *May*, 170 Okla. 198, 39 Pac. (2d) 107; *Barnett* v. *Merchant's Life Ins. Co.*, 87 Okla. 42, 208 Pac. 271; *Illinois Banker's Life Ass'n* v. *Jackson*, 88 Okla. 133, 211 Pac. 508. This rule has been recognized and followed by the Tenth Circuit in *B. & H. Passmore Metal & Roofing Co., Inc.* v. *New Amsterdam Casualty Co.* (opinion by Judge Phillips) 147 Fed. (2d) 536.

This rule is equally well settled in Oklahoma that insurance contracts will be liberally construed in favor of insured so as to effectuate, rather than defeat, liability and coverage. *Bankers' Reserve Life Co.* v. *Rice*, 99 Okla. 184, 226 Pac. 324. And where insurance policy is reasonably susceptible to different constructions that construction

most favorable to insured will be adopted. *Metropolitan Life Ins. Co.* v. *Lillard*, 118 Okla. 196, 248 Pac. 841.

Thus where insurance contract is capable of two constructions,—under one of which recovery is allowed but under the other of which recovery is denied,—that construction will be followed which permits recovery. *Maryland Casualty Co.* v. *Scharlack* (C. C. A. 5) 115 Fed. (2d) 719 (Aff. 31 Fed. Supp. 931).

In Oklahoma, the burden is upon the insurance company which asserts the restriction against liability and coverage, to show that the loss and damage fell within the exclusion clause. *General Accident, Fire & Life Assurance Corp.* v. *Hymes*, 77 Okla. 20, 185 Pac. 1085; *Great Southern Life Ins. Co.* v. *Churchwell*, 91 Okla. 157, 216 Pac. 676.

It appears upon the face of the opinion that the Circuit Court of Appeals did not follow and apply these fundamental rules in construing and interpreting respondent's policy and Endorsement No. 1.

(2) It is conceded by respondent (Tr. 77) that a fire negligently and hostilely caused is one of the hazards and perils covered and insured against by its insurance policy, and that it is liable under said policy for loss and damage caused petitioners by fire before the resultant explosion. Respondent further concedes (Tr. 78) that if the proximate cause rule is applicable, it is also liable to petitioners for loss and damage sustained following the explosion, since the latter event was merely incidental to and occurred as a direct and proximate result of the pre-

cedent negligent and hostile fire. By holding the proximate cause rule inapplicable, the Circuit Court of Appeals nullified the admitted coverage and liability under respondent's policy, and denied petitioners their right to be protected for the full effects and results of the insured hazard and peril.

In so holding, the Circuit Court of Appeals refused to follow and apply the applicable local law as announced by the Supreme Court of Oklahoma in *Springfield Fire & Marine Ins. Co.* v. *Oliphant*, 150 Okla. 1, 300 Pac. 711. In that case the Court, in paragraph 2 of the syllabus, held:

> "In an action on a fire insurance policy which exempted insurer from liability where loss occurred by explosion, unless fire ensues, and in such event for the fire damage only, the insurer is liable for the damage caused by explosion as well as damage by fire, where the explosion was caused by a preceding hostile fire."

An excellent discussion as to the applicability of the proximate cause rule in cases of this kind is contained in the body of the Court's opinion in the above case, to which we invite the attention of this Court. It is submitted this case is in point on principle with the case here; and that there is no justification for the lower court's conclusion that the cases are distinguishable because a fire insurance policy is involved in the cited case and an automobile liability insurance policy (comprehensive) is involved in our case. Both are insurance policies, and the same general rules of construction are applicable to both, particularly

as to application of the proximate cause doctrine, rule of liberal and strict construction, etc.

(3) Other Circuit Courts, and this Court, have followed and applied the proximate cause rule in determining liability and coverage under insurance policies in a variety of situations, where were involved exclusion or exemption clauses even broader and more inclusive than Endorsement No. 1.

In *Washburn* v. *Miami Valley Ins. Co.*, 11 Fed. 633, at 639, Judge Swayne said:

> "Now, there is another remark, perhaps rather hypercritical, but proper in this connection to be made, and that is, according to the technical formality of the law of insurance this explosion cannot be recognized. It was a part of that fire—just as much a part of the fire, and admitted to be as such, covered by the insurance, as if there had not been an explosion."

In *Waters* v. *Merchant's Louisville Ins. Co.*, 36 U. S. 210, 224, 9 L. Ed. 691, 697, Mr. Justice Story used this language:

> "Some suggestion was made at the bar whether the explosion, as stated in the pleas, was a loss by fire, or by explosion merely. We are of opinion that as the explosion was caused by fire, the latter was the proximate cause of the loss."

In *Norwich Union Fire Ins. Soc.* v. *Board of Comm'rs* (C. C. A. 5) 141 Fed. (2d) 600, the Court squarely held that contracts insuring against direct loss or damage are governed by the doctrine of proximate cause. In support of its holding the Court cited and relied on the opinion of

this Court in *Lanasa Fruit Co.* v. *Universal Ins. Co.*, 302 U. S. 556, 82 L. Ed. 422. See also in this connection:

—*Louisiana Mutual Ins. Co.* v. *Tweed*, 7 Wall. 44, 19 L. Ed. 65;

Washburn v. *Farems' Ins. Co.*, 11 Fed. 304;

Ætna Life Ins. Co. v. *Allen* (C. C. A. 1) 32 Fed. (2d) 490.

It thus appears that the opinion of the Circuit Court of Appeals in the instant case is in conflict with, and contrary to, the decisions of other Circuit Courts and of this Court. Therefore this Court is justified in granting certiorari for the purpose of resolving said conflict.

(4) The appellate courts of other states have likewise followed and applied the doctrine of proximate cause in determining liability and coverage under insurance policies, including: ordinary fire insurance policies on private dwellings or business structures; automobile fire insurance policies; automobile theft insurance policies; and automobile collision policies. In each of these cases, the various State Courts have held that the particular exemption clause did not relieve the insurance company from liability and coverage where the act or thing which set the events in motion finally resulting in the loss did not come within the exclusion clause, and was a hazard and peril admittedly insured against.

We call the Court's particular attention to a recent opinion and decision of the New York Court of Appeals in *Tonkin* v. *California Ins. Co. of San Francisco, Inc.*, 62 N. E. (2d) 215. There plaintiff was driving his car along

the street in New York when he noticed his car was smoking and burning under the dashboard. A gust of smoke caused him to lose control of his car, resulting in a collision with another vehicle. Practically all of his loss resulted from the collision. The policy provided coverage for loss or damage to the automobile from fire, theft and wind storm, but excluded loss by collision. Defendant conceded liability for loss by fire but denied liability for that portion of damage resulting from collision on the ground it was excluded from coverage under the policy.

But the New York Court of Appeals held such loss was not excluded, saying:

> "The policy language is definite enough to exclude loss when collision is the primary and exclusive cause, and it would do so here except for the fact that fire—the hazard insured against—was the factor causing the driver to lose control of the vehicle and was so closely associated with it in point of time and character as to constitute the proximate producing cause of the collision."

The opinion and decision in the above case is set out in full in "Petition of Appellees for Rehearing" filed in the lower court, and appears at pages 91 to 94, inclusive, of the transcript of record. It is submitted that an analysis of this case will disclose that it cannot be distinguished in principle from the instant case.

Other State decisions supporting our position that the rule of proximate cause is applicable are: *German Ins. Co.* v. *Hyman*, 42 Colo. 156, 94 Pac. 27; *Western Ins. Co.* v. *Skass*, 64 Colo. 342, 171 Pac. 358; *Transatlantic Fire*

Ins. Co. v. *Dorsey*, 56 M. D. 70, 40 Am. Rep. 403; *Fire Ass'n of Philadelphia* v. *Evansville Brewing Ass'n*, 73 Fla. 904, 75 So. 196; *Hall & Hawkins* v. *National Fire Ins. Co.*, 155 Tenn. 513, 92 S. W. 402; *Tracy* v. *Polmetto Fire Ins. Co.* (Iowa) 222 N. W. 447; *Delametter* v. *Home Ins. Co.* (Mo.) 126 S. W. (2d) 262; *American Indemnity Co.* v. *Halley* (Tex.) 25 S. W. (2d) 911.

See also Blashfield's Ency. of Automobile Law, Vol. 6 (Part 1) pages 278, 279, 295.

(5) Actually what the Circuit Court of Appeals has done in the instant case,—or so it appears to us,—is to apply the doctrine of proximate cause in reverse in arriving at its conclusion. Thus the lower court erroneously concluded that the loss and damage sustained by petitioners following the explosion, "arose out of explosion" within the meaning and import of Endorsement No. 1, simply because the explosion was nearer in point of time to the loss and damage than was the fire. But this conclusion disregards the fact that the efficient, primary and motivating cause,—the real proximate cause of such loss and damage,—was the precedent fire which was the superior, controlling and responsible agency bringing about the explosion and without which it would not have occurred, the explosion simply being a part of the antecedent fire.

In *Cushing Gasoline Co.* v. *Hutchins*, 93 Okla. 13, 219 Pac. 408, the Supreme Court of Oklahoma states the applicable rule as follows in paragraph 5 of the syllabus:

> "The proximate cause is the efficient cause; the one that necessarily sets other causes in operation. The

causes that are merely incidental or instruments of a superior controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

This statement of the rule was taken *verbatim* from the opinion and decision of this Court in *Ætna Insurance Co.* v. *Boon*, 95 U. S. 124, 130, 24 L. Ed. 395. See also the general statement of the rule in 38 Am. Jur. 696.

Thus it clearly appears the lower court, contrary to the mandate in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. Rep. 817, refused to follow and apply the applicable local law, and wholly disregarded persuasive decisions from other State Courts.

Second Point

The Circuit Court of Appeals erred in so construing respondent's policy as to nullify all coverage thereunder, contrary to local law.

The effect of the decision of the lower court was to hold that insured had no insurance coverage or protection whatsoever so long as the truck-transport was being used to haul butane. Such construction and such result cannot be properly countenanced nor justified under the provisions of the policy when considered as a whole. This was a "comprehensive" automobile liability insurance policy. The exclusion endorsement may not be properly construed alone and without reference to the remainder of the policy. It must be construed in relation to the other

provisions of the policy, and in such way as not to nullify the liability and coverage admittedly afforded thereunder. One of the perils and hazards covered was loss and damage from fire negligently caused by the operation of the insured vehicle. Merely because an explosion occurred as a direct and proximate result of such precedent negligent fire, did not justify the lower court in so construing the exclusion endorsement as to nullify the admitted coverage, so that insured is afforded no insurance protection under such circumstances. Yet, we submit, that is exactly what the lower court did in its present opinion and decision.

In so holding, the lower court has construed the exclusion endorsement strictly against the insured and liberally in favor of the insurance company, in violation of the decisions of the Supreme Court of Oklahoma heretofore cited. Surely this is not permitted under the Erie Railroad Case.

Third Point

The words "accidents arising out of explosion" contained in exclusion clause are ambiguous, and Circuit Court of Appeals erred in not resolving such ambiguity in favor of petitioners, as required by local law.

Both the district court and the lower court held Endorsement No. 1 was not ambiguous. But the difference is the district court held the proper construction of said Endorsement did not exempt respondent from liability and coverage for loss and damage after the explosion, while the lower court held it did.

Such a situation has been previously held by the Tenth Circuit to be some indication that ambiguity exists in the language of the policy. *Franklin* v. *American Nat'l Ins. Co.*, 135 Fed. (2d) 531 (opinion by Judge Huxman).

Exactly what is meant by the words "accidents arising out of explosion?" What would constitute an accident within the meaning of the language employed? Would loss and damage sustained by petitioners following the explosion be considered "accidents" within the meaning of the language employed, where the explosion was preceded and proximately caused by an accidental fire? Or would the fire accidentally and negligently caused be considered the "accident" and the loss and damage following from the subsequent explosion be considered as just that,—loss and damage? And are the words "accidents arising out of explosion," as the lower court appears to hold, synonymous with "damage and loss" arising out of explosion?

That such questions as to possible meaning of the language employed occur, would seem to indicate ambiguity. If ambiguity existed it was the duty of the lower court to resolve same in favor of petitioners, in accordance with the Oklahoma decisions heretofore cited. This the lower court failed to do, thereby again violating the Erie Railroad Case.

Fourth Point

The Circuit Court of Appeals erred in treating loss and damage sustained by petitioners following explosion as being synonymous with "accidents arising out of explosion" within meaning of language of Endorsement No. 1.

It seems quite obvious that the lower court erred as above stated. In more than one place in its opinion the lower court says that losses are exempted from coverage under the policy if they arose out of explosion of butane gas.

But this is not what the exclusion endorsement says. The Endorsesment does not provide that no coverage shall be afforded for "losses" arising out of explosion but that no coverage is provided for "*accidents*" arising out of explosion. This is the language employed by the insurance company. It chose and fixed the wording of the Endorsement. And the word it employed was "accidents" and not "losses." Certainly this cannot be without significance and without meaning. Had the insurance company meant to exempt "losses" arising out of explosion from coverage it could easily have so provided, but it chose not to do so.

The lower court was without authority to substitute or read into the exclusion clause language respondent did not employ. That court was required to take the Endorsement as it found it and (under Oklahoma law) construe it strictly against respondent. This the lower court refused to do, but throughout its opinion and decision erroneously treated and construed "losses" as "accidents" contrary to express wording of the exclusion clause.

And in no event could it be said that it appears here that loss and damage resulted from "accidents" arising out of explosion. The injuries and damage sustained by petitioners following the explosion were not "accidents" but were simply "losses,"—foreseeable results and consequences of the explosion caused by the precedent negligent fire. The fire, and not the explosion, was the "accident" (Tr. 23, 24).

But the lower court, again ignoring the Erie Railroad Case, construed the exemption clause liberally in favor of respondent and strictly against petitioners, contrary to Oklahoma law.

Fifth Point

The Circuit Court of Appeals erred in reversing outright the declaratory judgment of the district court in favor of petitioners, when under the admissions of respondent made in both lower courts, said judgment was in part correct and should have been affirmed.

In the opinion and decision of the lower court it is stated that (Tr. 77): "On this record, the appellant concedes liability under its policy for all damages caused by the fire prior to the explosion."

Notwithstanding this, the lower court rendered a straight order of *reversal*, without any modification. Since the district court specifically held (Tr. 55) that respondent was liable and coverage was afforded under its policy for damage and loss caused by fire before the explosion, if the

present order of *reversal* of the lower court stands without modification, it might be hereafter contended that under the rule of *res judicata* respondent had no liability whatever, even for the loss and damage occurring by fire before the explosion.

Certainly petitioners should not be required to assume this hazard. We believe that the action of the lower court in this regard constitutes such departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, as indicated in subparagraph 5 (b) Revised Rules, as amended, of this Court.

CONCLUSION

In holding the proximate cause rule inapplicable, thereby nullifying the admitted coverage under respondent's policy, and in adopting a strict rule of construction against petitioners, the opinion and decision of the Circuit Court of Appeals is contrary to the Oklahoma law, in conflict with decisions of other Circuit Courts and of this Court, and wholly ignores many persuasive decisions of other State Courts. The main question is one of general importance in the field of insurance law, upon which this Court should further speak.

It is therefore respectfully submitted that a Writ of Certiorari should be granted, that the decision of the Circuit

Court of Appeals for the Tenth Circuit should be reversed, and the judgment of the district court should be reinstated and affirmed.

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